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OFFICE OF GENERAL
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FEDERAL ELECTION COMMISSION

PROBABLE CAUSE ORAL HEARING

MUR 6133

FINAL TRANSCRIPT

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FEDERAL ELECTION
COMMISSION
2009 NOV 10 AM 8: 35

Wednesday, November 4, 2009

999 E Street, N.W.
9th Floor Meeting Room
Washington, D.C.

10044262130

COMMISSION MEMBERS:

STEVEN T. WALTHER, Chairman

MATTHEW S. PETERSEN, Vice Chairman

CYNTHIA L. BAUERLY, Commissioner

CAROLINE C. HUNTER, Commissioner

ELLEN L. WEINTRAUB, Commissioner

DONALD F. MCGAHN II, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel

SUSAN LEBEAUX, General Counsel

ROY LUCKETT, General Counsel

KATHLEEN GUITH, General Counsel

ALEC PALMER, Acting Staff Director

WITNESS:

JAMES BOPP, JR., ESQ., National Right to Life PAC

**JARDIM REPORTING ASSOCIATES
(703) 867-0396**

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P R O C E E D I N G S

(10:06 a.m.)

CHAIRMAN WALTHER: Good morning, everyone. We will convene this probable cause hearing session of the Federal Election Commission on November 4, 2009. This is a probable cause hearing on the matter under review of 6133, National Right to Life PAC. Representing the respondent and the National Right to Life PAC is James Bopp, Jr., from the Law Firm of Bopp Coleson & Bostrom.

On the left we have Vice Chairman Petersen and Commissioners Hunter and McGahn, on my right, Commissioners Bauerly and Weintraub. In addition to the commissioners who are here today, we have our general counsel, Tommie Duncan, Roy Luckett, Sue Lebeaux and Kathleen Guith. On my left is Alec Palmer, acting staff director.

An issue in MUR 6133 is Respondent's failure to file, or late filing of 24-, 48-hour notices of independent expenditures pursuant to 2 U.S.C. 434(g). This act requires all persons, including political committees, to file independent expenditure notices within 24 or 48 hours, whichever is applicable, of when they "make contact," make or contract to make an expenditure. Any expenditures

1 aggregating \$1,000 or more made after the 20th day, but more
2 than 24 hours before the date of an election, must file a
3 report within 24 hours of the independent expenditure. Any
4 expenditures aggregating 10,000 or more at any time during
5 the calendar year up to and including the 20th day before an
6 election must be disclosed within 48 hours.

7 The key language in the regulations at 11 C.F.R.
8 104.4 and 109.10 states that the notices must be received by
9 the Commission within 24 or 48 hours following the date on
10 which the communication constitutes an independent
11 expenditure is publicly distributed or otherwise publicly
12 disseminated.

13 On July 20, 2009, the Office of General Counsel
14 sent its brief to the respondent and notified the respondent
15 that OGC was prepared to recommend to the Commission a
16 finding of probable cause to believe that a violation of 2
17 U.S.C. 434(g) has occurred. On April 6, 2009, the
18 respondent filed its reply brief and notified OGC that
19 Respondent was requesting a probable cause hearing. On
20 August 14, the Commission granted the request and scheduled
21 today's hearing.

22 Mr. Bopp, as you aware, in a letter dated

1 September 15, you are allowed 15 minutes for your opening
2 statement. Your statement should present all the issues,
3 arguments or evidence that you believe have already briefed
4 -- you have already briefed or brought to the attention of
5 the Office of General Counsel. Following your presentation,
6 commissioners, the general counsel and staff director will
7 have the opportunity to ask questions.

8 We recently revised our probable cause hearing
9 procedures to permit commissioners to direct questions to
10 the general counsel and staff director to elicit
11 clarification. This change is consistent with our recently
12 adopted policy for audit hearings. Only the commissioners
13 and not counsel may direct questions to our general counsel.
14 The Commission will prepare a transcript of this hearing
15 which will become part of the record for this matter.

16 Mr. Bopp, welcome to our hearing. Thanks for
17 being here. Please proceed.

18 MR. BOPP: Thank you very, very much for the
19 opportunity to appear before the Commission. Certainly we
20 appreciate the opportunity to address the matters that the
21 general counsel has raised and the audit has raised
22 regarding the conduct of the National Right to Life PAC.

1 COMMISSIONER BAUERLY: Excuse me, I'm sorry to
2 interrupt you, but I think we're having -- I'm having a
3 little trouble hearing you and I believe our transcriber is
4 as well.

5 SECRETARY: You might want to try one of the other
6 microphones.

7 MR. BOPP: Am I not close enough?

8 SECRETARY: Probably not.

9 MR. BOPP: Hello? Hello?

10 SECRETARY: I would try one of the other mikes.

11 MR. BOPP: There we go. Looks like one's that's
12 on. Let's try over here. Thank you. Sorry about that.

13 Let me pretend I haven't started. My name is Jim
14 Bopp. I represent the National Right to Life PAC and we
15 appreciate very much the opportunity to address the
16 Commission regarding the matters that have arisen in the
17 audit of National Right to Life PAC and the recommendations
18 of the Office of General Counsel.

19 I know at least for us this sort of proceeding is
20 new. I hope that -- and I notice too, new to the Commission
21 and I hope the Commission has found it to be useful because
22 we sure appreciate the opportunity to do -- to do this.

1 I think there are four reasons why National Right
2 to Life PAC should either be found to have not committed a
3 violation

4
5
6 There are four reasons that commissioners have
7 found to be persuasive in dealing with a matter such as this
8 and I think each of these four considerations are applicable
9 to the current situation.

10 Certainly we have conceded that there were late
11 reports that were filed by the National Right to Life PAC
12 during the 2003-2004 election cycle. They were late because
13 it is also true that the statute states that a report -- the
14 trigger date for a report is when you distribute publicly
15 distributed communications and then assuming you have spent
16 the applicable amount, then the report is triggered.

17 And that is because of a simple error of -- error
18 on the part of the administrators of National Right to Life
19 PAC, and that is, that they believe that the reporting date
20 was triggered by the payment for those independent
21 expenditures, not the distribution date. And we acknowledge
22 that's an error, but we think that that error is excusable

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1 under the circumstances.

2 Now the result of that, that is, that error, were
3 that some independent expenditure reports were filed early,
4 you could say. Others were filed late. The practice, as
5 many of you know, is that for broadcast advertising, you
6 have to pay in advance, so when the National Right to Life
7 PAC paid for the purchase of air time, they would do so in
8 advance. They would then file a report, whichever report is
9 applicable, to that payment. So the report was actually
10 filed prior to the distribution of the statement, that is,
11 the airing on radio.

12 As to other forms of independent expenditures,
13 that is, mail, phone, those bills arrive afterwards. That
14 is, there is no way to know on the date that the
15 communication is publicly distributed what the amount is and
16 often it's -- there's no way to know when multiple
17 candidates are involved in the piece what the allocation --
18 the amount allocable to each candidate would be.

19 And so you cannot really determine accurately what
20 amount is spent until you receive the bills. Postage rates
21 -- let's say mail -- postage rates vary tremendously based
22 upon a whole series, a laundry list of factors that the post

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1 office applies. So you don't know until the communication
2 has actually been delivered and accepted by the post office
3 what, for instance, the postage is. So that's just simply
4 one example.

5 All those things are then billed by our vendor
6 after the fact and then paid by the National Right to Life
7 PAC after the fact. And of course at that time, they are
8 able to accurately state what the independent expenditure
9 amount was and their practice was then to file a report if
10 the reporting requirements are triggered by the amount.

11 So we had the interesting situation, which I'll
12 comment more extensively on in a minute, of the National
13 Right to Life PAC filing 24- and 48-hour reports regarding
14 independent expenditures done in primaries and the general
15 election after those elections have already occurred.

16 Now the four factors I would start with, that
17 there was no clear guidance to the laity, that is, the
18 people whose obligation it is to comply with the Federal
19 Election Campaign Act, regarding the reporting of
20 independent expenditures. Some have referred to this as
21 situations in which there is a confusion as to the
22 requirements of the law that the Commission has created.

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1 Now the Office of General Counsel, of course,
2 points to regulation, statutes, explanations and
3 justifications of the adoptions of these regulations, the
4 kinds of things that professionals and lawyers would look
5 at, to determine what -- the scope of the law. We have
6 cited to the publications that the Commission prepares for
7 the laity, that is, instructions for filling out of forms,
8 candidate guides, the record, which the Commission would
9 prepare for purposes of informing the general public and
10 those who are not legally trained and expert in the area
11 would figure -- would use to figure out their
12 responsibilities.

13 And here, there's really, I think, one fundamental
14 problem, and that is that the Commission, for whatever
15 reason, has chosen in those publications to use legal terms
16 of art where there was a perfectly available, absolutely
17 appropriate lay phrase that could have been utilized that
18 would have made it clear what the obligation was. These
19 public -- these publications for the general public used a
20 term of art "independent expenditure" and of course, we know
21 that's a legal term of art. For a communication it means a
22 communication which expressly advocates the election or

1 defeat of a clearly identified candidate without any
2 cooperation, consent, consultation with a candidate.

3 To a lay person, an independent expenditure is
4 when you distribute funds. An expenditure is when you pay
5 money. So to describe -- and this is replete in all of
6 these then available publications -- to those who would seek
7 in 2003 and 2004 to comply, there was a repetitive use of
8 that phrase "independent expenditure" and rather than the
9 absolutely -- the available phrase, which it seems should
10 have been used to a lay audience, an independent
11 communication.

12 I mean, if these publications had said when you
13 make an independent communication of \$1,000 or more within
14 the applicable period you have to file a report, people
15 would have readily understood exactly what we're talking
16 about. Instead the term of art is used, which the lay
17 person interprets as a payment, and that's exactly the way
18 National Right to Life PAC interpreted that.

19 So you have statements such as each time that
20 independent expenditures aggregate in excess of \$1,000. A
21 lay person would look at that and say independent
22 expenditure means I spent money. I spent an aggregate in

1 excess of \$1,000. Or we also see independent expenditures
2 reach or exceed \$10,000 for the 48-hour report. Then it
3 would say expenditure is publicly distributed. Well that is
4 kind of awkward and curious what that means for a lay
5 person, but many would look at that and say, well that just
6 means I paid it.

7 And you wonder why it is that these communications
8 to the general public would not have said the communication
9 is publicly distributed, because then people would have
10 known what you are talking about. Other phrases, the \$1,000
11 threshold is reached during the final 20 days before an
12 election. This is -- I'm referring again to a 24-hour
13 report.

14 So now we're really focusing on the money. We're
15 not even using the word "expenditure." We're saying how
16 much, how much you have spent. The \$1,000 threshold is
17 reached during the final 20 days before the election. Even
18 the word "disbursement" is used in one of the publications.
19 This reporting requirement is in addition to the requirement
20 to file 24-hour reports of independent expenditures each
21 time disbursements for independent expenditures aggregate in
22 excess of \$1,000.

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1 Surely everyone would agree that a disbursement is
2 a payment of money. I mean, the Commission uses that phrase
3 not as a term of art, but to describe situations in which
4 payment of money has been made. It's not a term of art in
5 federal election law other than it is used in that sort of
6 special way by the Commission to describe what -- exactly
7 what lay people would understand it to be, that is, a
8 payment of money.

9 So now it is true later in a 2007 candidate guide,
10 not available of course in 2003 and 2004, they do have a
11 paragraph that says that the date that a communication is
12 publicly disseminated serves as the date that the segregated
13 fund must use to determine whether the total amount of
14 independent expenditures have in the aggregate reached or
15 exceeded the threshold amount. But, of course, even that
16 guide continues to use independent expenditure, \$1,000
17 thresholds and things like that everywhere else to describe
18 your reporting requirement.

19 So I think we have bonafide confusion that would
20 arise by a lay person looking at their reporting
21 requirements that arose all throughout the publicly
22 available publication for the general public, including the

1 instructions for the report, the record, candidates guide,
2 all spoke of it in the way that I have illustrated.

3 You know, furthermore, there was no instruction,
4 except in the regulation, that we have been able to find
5 regarding the situation in which you have to estimate what
6 your expenditures were, because I've already mentioned if
7 you -- if you are trying to comply with an independent
8 expenditure report for a mail piece, you don't have what it
9 costs. You will not have maybe for weeks what it costs to
10 do that piece. You don't know the postage, you don't know
11 the printing, you don't the stuffing costs, et cetera.

12 If the Commission was expecting people to file a
13 report when they don't know what the expenditure was, it
14 would seem logical that they would have explained to the
15 public that well, in those circumstances, which are actually
16 more frequent than when you actually know the costs, they
17 are more frequent when you don't know the costs, they would
18 have explained in these publications, well you got to
19 estimate because we understand you're not going to have
20 these -- these figures. But to comply -- and that it would
21 be complying, which would be also a question if anybody had
22 thought of it, providing an estimate is compliance. It

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1 would seem that these publications would have said this.

2 So again, the absence of that explanation would
3 lead people to believe well, we just -- you know, we don't
4 know what the expenditure is until we get the bill, when we
5 pay the bill and we can do this.

6 Second reason is that this was a single error.
7 That is, it was a single mistake of law, if you will, that
8 the report is required when the communication is
9 disseminated rather than when a payment is made. It is
10 certainly true that that resulted, that single error
11 resulted in 130 reports being filed late regarding -- so in
12 those reports, 1,545 independent expenditures totaling
13 \$3,718,909, still single error.

14 When you look at other examples in which single
15 errors have resulted in multiple mistakes, multiple
16 violations, if you will, such as, and I don't know how to
17 pronounce S-e-h-k-o-n MUR, you had a single mistake which
18 resulted in 219 -- single error resulting in 219 mistakes on
19 filings that the candidate had done.

20 The third is that -- is that the FEC had other
21 means of providing clear guidance and it failed here as it
22 has failed in some other cases as to when -- as a factor

1 that was then taken into account by members of the
2 Commission. Here we have in January of 2004, February of
3 2004, March of 2004, National Right to Life PAC filed 24-
4 hour and 48-hour reports regarding independent expenditures
5 in elections, primary elections that had already occurred,
6 already occurred.

7 The election had already occurred. If they were
8 complying with the regulatory interpretation of when there
9 were -- these reports were done, they would have then been
10 doing the absurd thing, doing communications, urging people
11 to vote for candidates in a campaign, in an election that
12 already occurred.

13 Now you got to wonder what that all means. I
14 mean, did the people here at the Commission that were
15 looking at these reports as they were being filed, I mean,
16 did they look at them? There were no complaints filed by
17 anyone about this. Does anyone look at these things, you
18 know, that people have to file? Does anybody care what they
19 say? Does it matter to anyone?

20 Nothing happened. Nothing happened here by the
21 staff, the reports analysis, nothing. Well if National
22 Right to Life would have been informed -- been informed hey,

1 we received a letter, which we do when our things are
2 reviewed and there's a question, are you really doing a
3 communication after an election has occurred? We would have
4 found out what the reporting requirements were and we would
5 have complied.

6 The final is, it's a sledgehammer to crack a
7 walnut. The average independent expenditure that was late
8 filed was -- amounted to \$2,407. Again, one mistake
9 repeated, admittedly, numerous times, and it seems to me
10 that that mistake, the late filing, had nothing to do with
11 the amount spent, but a mistake. In similar situations,
12 when that factor is taken into consideration, the Commission
13 has rejected fines of \$300,000 for in favor of a fine of
14 \$7,000.

15 So these are the four items which we believe
16 substantially mitigate the situation and put it in the
17 context of a situation

18
19 And if
20 that is what is to be insisted upon, we ask the Commission
21 not to go forward with a probable cause.

22 CHAIRMAN WALTHER: Thank you very much. Is it

1 your position that all payments were made on time if you had
2 -- if we were to interpret the payment to be due when the
3 distribution was made, the cash distribution?

4 MR. BOPP: Yes. Yes, that is my understanding of
5 that.

6 CHAIRMAN WALTHER: Any questions? Commissioner
7 McGahn.

8 COMMISSIONER MCGAHN: When your client reports the
9 independent expenditure on its regular reports, not the
10 special IE report, what date does the law demand that your
11 client use to report the expenditure in that instance? Same
12 date? Is that on the IE report or a different date?

13 MR. BOPP: I haven't contemplated that question.
14 That is a really profound question because the 24- and 48-
15 hour reports are triggered by --

16 COMMISSIONER MCGAHN: Now you're making me blush.
17 I think it's a different date.

18 MR. BOPP: I think so.

19 COMMISSIONER MCGAHN: I think it's --

20 MR. BOPP: It's a payment date.

21 COMMISSIONER MCGAHN: It's the date of
22 dissemination for the IE report, but then it's the date of

1 the expenditure on the regular report, so you have two
2 different dates and I thought of that because of your
3 argument on the brochures you used a term of art. So you
4 have a situation where your client not only -- well, with
5 all due respect, Mr. Bopp, the idea that you don't know --

6 MR. BOPP: I'm not saying I don't know.

7 COMMISSIONER MCGAHN: Well you didn't off the top
8 of your head. It's not unreasonable that your client may be
9 -- would be confused by this because it's not easy.

10 Could you flesh out a little bit something that I
11 hadn't thought of, which in this case it seems like if you
12 did T.V. or radio, whatever sort of broadcast, that seems to
13 be under control because you have to pay for the time
14 upfront. This sounds more like mail or phones and you made
15 an argument about you can't really tell how to split up the
16 cost of the mail until after the fact.

17 I guess my question is two parts. First, the
18 amount at issue here was not for one race. It was spread
19 out among a whole host of federal elections, and did the
20 mail include more than one candidate?

21 MR. BOPP: Yes. Typically the National Right to
22 Life PAC does a brochure type mailing that would have

1 multiple candidates, even state candidates, as well as
2 federal candidates. So while based on the publication
3 itself, we would know the allocation of percentage. We
4 don't know the cost of the mailing itself in order to apply
5 the percentage, until somewhat later when they bill us.

6 COMMISSIONER MCGAHN: Is there anything in this
7 situation where you may have been doing a mail piece that
8 mentioned a candidate, for example, maybe the top of the
9 ticket, that they were not within the IE reporting period
10 because their primary was a different time of the year, but
11 maybe the House candidate, the Senate candidate was so there
12 was some difficulty in parsing the mail out that way because
13 perhaps you didn't have an IE report due for one of the
14 candidates mentioned?

15 I have no idea, because I haven't actually
16 reviewed any of the mail, but I'm trying to get into the
17 weeds here on how complicated this is or how complicated
18 this isn't, because one mail piece mentioning one candidate
19 isn't really hard to figure out, but a national operation
20 with multiple candidates, that peaked my interest.

21 MR. BOPP: I think that would be unlikely that
22 there would be a candidate on the mail piece that wasn't,

1 you know, a candidate in the election that the piece was
2 addressing, so I think that would be very unlikely.

3 COMMISSIONER MCGAHN: My final question is, as I
4 hear your argument, which there's no dispute that your
5 client did not file some IE reports on time under a reading
6 of the regs. You hear the argument on what the brochures
7 say, that it's not as clear as it could be and all that.
8 But at the end of the day, we have some late reports.

9 And the question I have is what -- what is the
10 Commission to do about it when it comes to looking at
11 penalties? You argued this a little bit, but you hadn't
12 gotten quite to this point. If a campaign doesn't disclose
13 money into the campaign, the Commission has to treat that a
14 certain way. Should the Commission be treating independent
15 expenditures the same way as IE reports treated the same way
16 as campaigns not disclosing money?

17 MR. BOPP: Well I --

18 COMMISSIONER MCGAHN: For the purposes of
19 accounting?

20 MR. BOPP: Well certainly as to this error, I
21 don't see how this error relates to the amount and so as to
22 this error, I would say no. I would argue no. The -- of

1 course, the most serious type -- types of violations are
2 when a PAC or a candidate has money that is illegally
3 available to them either because it violates the
4 contribution limit or because it's from an unlawful source.
5 Those are the ones that go to the heart of the effort to
6 prevent corruption as far as the Federal Election Campaign
7 Act is concerned.

8 Here it's -- there is no connection between
9 corruption and independent expenditures the court has
10 repeatedly held. So it's of a different nature. It is, the
11 court has found, adequate justification as far as voter
12 information is concerned, you know, that support the
13 requirement. So I'm not saying that they're not justified,
14 that the reporting is not justified. It is justified.

15 But the reason for the regulation doesn't go to
16 the heart of the effort of the Federal Election Campaign Act
17 to prevent corruption.

18 CHAIRMAN WALTHER: Any other questions of the
19 commissioners? Commissioner Weintraub.

20 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
21 You don't consider yourself a member of the laity, as you
22 describe it?

1 MR. BOPP: Not in this respect. Not in respect to
2 the Federal Election Campaign Act.

3 COMMISSIONER WEINTRAUB: We won't get into your
4 religious beliefs. You understand, you can see, I think I
5 heard you say this, that the law was not complied with by
6 your clients?

7 MR. BOPP: Yes.

8 COMMISSIONER WEINTRAUB: So it wouldn't really be
9 surprising, in fact, I would be hard pressed to come up with
10 a reason for us not to find probable cause to believe that
11 the law was violated in this instance. So we're really just
12 talking about the penalty, right?

13 MR. BOPP: Well, you know, I think it's up for
14 each commissioner to decide whether or not the -- or reasons
15 of amelioration rise to the level that this is not the kind
16 of case because there's no question also that once the Right
17 to Life PAC became aware of the legal requirement, they are
18 in compliance with it.

19 I am hard pressed to find any real injury here to
20 anyone or -- I'm really struck. I was struck in the cab
21 today by the fact that we were filing -- I'll repeat --
22 reports after the primaries had already occurred.

1 **COMMISSIONER WEINTRAUB:** You don't find that to be
2 an injury to the process?

3 **MR. BOPP:** Well I guess in theory, but we were
4 filed -- we filed, what, multiple, over 100, 130 maybe,
5 reports after elections that already occurred, regarding
6 elections that already occurred, and if anybody thought that
7 in looking at those reports that we were supposed -- that we
8 were doing communications at that time, nobody cared.

9 No complaints were filed. No staff person here
10 either looked at these reports or cared what they said or
11 when they were filed or what they were about. I mean, it's
12 really hard to say that there's any demonstrable injury
13 here.

14 **COMMISSIONER WEINTRAUB:** I would contest that,
15 that person -- there's no injury when the public is denied
16 the information that it is -- that is required to be
17 provided under the law. But you do concede that the law was
18 violated?

19 **MR. BOPP:** I have.

20 **COMMISSIONER WEINTRAUB:** Okay. How long has your
21 client been in existence making independent expenditures?

22 **MR. BOPP:** 1980.

1 **COMMISSIONER WEINTRAUB:** Since 1980. How long
2 have you been their counsel?

3 **MR. BOPP:** 1980.

4 **COMMISSIONER WEINTRAUB:** 1980. Would it surprise
5 you to learn that in 2004 your client was the number five in
6 terms of independent expenditure committees, made more
7 independent expenditures than any other independent
8 expenditure committee other than four in the country?

9 **MR. BOPP:** No, it would not, because they're most
10 -- the vast majority of PACs hardly do any independent
11 expenditures. They make contributions. We are one of the
12 few PACs that do substantial independent expenditures.

13 **COMMISSIONER WEINTRAUB:** And according to the --

14 **MR. BOPP:** No, I do not --

15 **COMMISSIONER WEINTRAUB:** According to the reports
16 that you've -- your client has filed, those independent
17 expenditures in 2004 amounted to over \$4.4 million.

18 **MR. BOPP:** The vast majority of the money that
19 they raise is used for independent expenditures. Unlike the
20 vast majority of PACs, we give --

21 **COMMISSIONER WEINTRAUB:** So pretty sophisticated
22 player with access to, can we agree, competent counsel?

1 MR. BOPP: Well I hope so.

2 COMMISSIONER WEINTRAUB: I hope so too. You may
3 recall in 2001 we did a rulemaking on independent
4 expenditures and you came in and submitted comments. And in
5 your comments, you said, organizations reporting independent
6 expenditures have always understood an independent
7 expenditure to be made when the communication is released to
8 the public.

9 And yet you say your client here couldn't possibly
10 be held responsible for not understanding that same basic
11 fact that all independent expenditure organizations
12 understand.

13 MR. BOPP: Well I mean there's various parts to
14 that question. Let me address the various part first. I'm
15 not saying that -- I'm not saying that -- even though it's
16 plausible, I'm not saying that they shouldn't be held
17 responsible.

18 So they are
19 prepared to be held responsible.

20 But unfortunately, I have more than one client and
21 they all don't know everything that I know. And there are
22 occasions, regretfully, that they don't know things that I

1 know and they'll ask me what they don't know.

2 Unfortunately, this client was in error during this period
3 of time on this issue without asking.

4 CHAIRMAN WALTHER: Commissioner Bauerly.

5 COMMISSIONER BAUERLY: Thank you. I'd like to go
6 back to something you said earlier and then again in
7 response to Commissioner Weintraub's question about how no
8 one noticed here at the Commission. Are you -- is it your
9 position that the committee never received any RFAs or
10 requests to amend because these were late filed?

11 I mean, as I understand it, and I apologize, I
12 don't have any of the RFAs in front of me, but I think it's
13 not quite accurate to say no one noticed, because it seems
14 to me they were asked about any missing IEs and there was
15 some discussion with the RAD analyst and so it seems to me
16 that's not quite accurate.

17 I'm curious if you've talked with your client
18 about the particular people who were in charge of filing
19 these and what their understanding was?

20 MR. BOPP: Well as to the second part, their
21 understanding was that they were to file the report when
22 they paid the bill and so they did even if the election had

1 already occurred. And the second is that it is my
2 understanding that no one at the Federal Election Commission
3 ever inquired about why we were filing reports after the
4 primaries about communications that we were doing after
5 primaries. No one ever asked the -- or brought to the
6 attention of the PAC that these were late.

7 And I do vaguely remember, and I'm sorry too that
8 I don't have that on my fingertips also, but that there were
9 some requests for additional information during the time,
10 that they never addressed this issue, which is even more
11 puzzling.

12 COMMISSIONER BAUERLY: My question was not quite -
13 - and if I misspoke I'll try to make that clear. It wasn't
14 about whether anyone questioned why you were doing IEs. But
15 were those filings in early 2005, so after the elections
16 were over, those were not amendments as opposed to -- those
17 were not in response to any requests by the Commission and
18 so they were late filed, but they were nonetheless filed in
19 early 2005 in response to either RFAs or phone discussions
20 with anyone at the Commission about when the -- when they
21 would have needed -- that they needed to be filed because
22 the expenditures had been made?

1 MR. BOPP: After the general election in 2004, we
2 filed 24-hour, 48-hour reports when we paid the bills,
3 independent expenditure bills. So we continued to file, as
4 we did throughout the election cycle, file reports, both
5 reports whenever bills were paid. And so there were all
6 these reports, and I don't know the number, but a number of
7 them were after either the primaries or the general election
8 occurred.

9 CHAIRMAN WALTHER: Counsel, I have a question. In
10 connection with the late payments, were there any late
11 payments -- if one were to adhere to that interpretation
12 that the payments were due based upon the expenditure of
13 money, were there any late payments under our records?

14 MR. BOPP: I'm sorry, what do you mean late
15 payments? I don't understand the question.

16 CHAIRMAN WALTHER: As I understand it, the
17 payments that your client made -- excuse me, the reports
18 your clients made were timely filed if one were to interpret
19 it the way you indicated, and that is based upon the date of
20 payment rather than the date of the dissemination of the
21 communication. I was wondering if in the records that bears
22 that out?

1 MS. DUNCAN: Yes, I actually understood your
2 question, Mr. Chairman and I was going to ask a question
3 along similar lines, because I think the theory here is that
4 the treasurer acted on the mistaken belief that the trigger
5 for reporting 24- and 48-hour notices was payment rather
6 than dissemination. But if you look at the period August
7 20, 2004 through October 14, 2004, there are several
8 independent expenditures that are disclosed on actual
9 disclosure reports -- on disclosure reports -- on scheduled
10 release of disclosure reports.

11 And I guess we would have expected, having seen
12 those, that there would have been 24- or 48-hour notices
13 immediately following those, given the theory of payment
14 being a trigger date. But we don't see those at all. In
15 fact there are no 24-, 48-hour IE reports filed during that
16 period of time, August 20 through October 14, where there
17 are on the actual disclosure reports several IEs reported.
18 So there is an apparent inconsistency between the record and
19 theory and we were going to ask about that as well.

20 MR. BOPP: I'm not familiar -- I'm not familiar
21 with that. I did not see that in the audit report. I
22 didn't see that in your general counsel's report.

1 MS. DUNCAN: We're raising it at this time because
2 you raised in your brief and in the January submission that
3 the theory was that the reports were made after the payments
4 and I'm just trying to explore the actual factual accuracy
5 or consistency with the record of that theory and there is
6 an apparent inconsistency.

7 MR. BOPP: So it's okay for you to bring up things
8 that are not in the audit or the general counsel's report,
9 but not me -- I mean, not me to bring up things that were in
10 my reply? I mean, I have no notice of that and if I had had
11 notice of it, I would have inquired? I can't respond to your
12 question because I don't know -- I don't know -- I have not
13 -- I don't know the facts surrounding what you are now for
14 the first time raising.

15 MS. DUNCAN: I appreciate your -- I appreciate
16 that point of view.

17 MR. BOPP: I'm sorry I cannot respond to that.

18 MS. DUNCAN: That's okay. I appreciate that point
19 of view, but I would say that we are not raising something
20 new. We're responding to something that you've raised,
21 which is your theory, which I guess I would have expected to
22 be supported by the factual record that the reports were

1 made after the date of payment.

2 I would submit, if it's okay with the chairman and
3 the rest of the Commission, is to just draw your attention
4 to one specific example. I'm not asking you to respond to
5 it today, but if in fact we keep the record open, Mr. Bopp
6 might be able to respond to it.

7 MR. BOPP: I'd be happy to.

8 MS. DUNCAN: At some later time.

9 MR. BOPP: I appreciate that.

10 MS. DUNCAN: I'll give you this just as an
11 example. The committee reported a \$571,000 independent
12 expenditure on October 1, 2004, Schedule E of its 2004 pre-
13 general report. And again, based on the explanation that
14 the treasurer would have made a 24- or 48-hour notice
15 report, immediately after that we would have expected to
16 have seen that filed October 2 or October 3, but in fact,
17 that notice, which I believe was a 48-hour notice, came in
18 July of 2005.

19 So that, I think, kind of crystallizes or is an
20 example of how there appears to be an inconsistency between
21 the theory and the fact.

22 MR. BOPP: Is this regarding -- so you say, just

1 so that I understand the question, you say there was an --
2 there was a independent expenditure report filed in July
3 2005?

4 MS. DUNCAN: Yes, that's correct.

5 MR. BOPP: Regarding --

6 MS. DUNCAN: That's -- yes.

7 MR. BOPP: -- this item?

8 MS. DUNCAN: Regarding this item that had been
9 previously reported on a disclosure report in October 1,
10 2004.

11 MR. BOPP: I'll be happy to look into it if I have
12 the permission of the Commission to respond to that after
13 the hearing.

14 CHAIRMAN WALTHER: Commissioner Weintraub.

15 COMMISSIONER WEINTRAUB: Thank you, Mr. Chair.
16 Following up on that, I -- if there's a factual dispute, I'd
17 like to the bottom of it, because the information that's
18 been provided to me indicates that of the 130 independent
19 expenditures that were made, that all but four of them were
20 not timely filed even under your theory.

21 So if that's not true then I'd like to -- I'd like
22 to see the, I don't know, maybe a chart that, you know, this

1 is when the payment was made and this is when the IE was
2 reported, or something like that. Because I think this is a
3 pretty basic factual dispute that we seem to have. And I
4 agree with counsel, you've made representations in your --
5 when you submitted your brief to us that these weren't --
6 all of these reports were timely filed under different --
7 assuming that, putting aside the fact that the treasurer was
8 wrong about the trigger date, but if the treasurer had been
9 right about the trigger date, then according to you, they
10 were timely filed and that's not the information that I
11 have.

12 So if you have different information I'd really
13 like to see it.

14 MR. BOPP: We'll address that as well.
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20 CHAIRMAN WALTHER: Did your treasurer rely on a
21 particular document, and your treasurer, was this the first
22 filing experience your treasurer had?

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1 MR. BOPP: I'm not sure about the -- if this was
2 the first filing experience that the treasurer had. We had
3 a change in treasurer in that period of time, but I don't
4 know how it corresponded to the election process. But it
5 was -- and if you would like me to respond to that, I can
6 certainly do that.

7 CHAIRMAN WALTHER: Well it's just of interest in
8 view of our colloquy here.

9 MR. BOPP: Yeah, I don't -- I do not think that
10 there was any particular -- in other words, that they have
11 not told me this is -- we looked at this right here. But
12 the -- if you collect the information that laity would
13 readily -- the Commission prepares for them and the laity
14 would look at, that's what we have been discussing.

15 CHAIRMAN WALTHER: In cases like this, your term
16 "laity" is anybody in the treasury? This is not an
17 unsophisticated organization here, a very sophisticated
18 counsel, and everyone knows that these 24-hour, 48-hour
19 reports have a reason, and that is to give people notice and
20 time to do something about it.

21 And you can game the system completely if it was
22 based upon payment, knowing that you're going to get a bill

1 after the election. So it's a matter of policy. It must be
2 clear to most people who have one or more filing experiences
3 there's a reason for these dates, policy reason, right or
4 wrong, that's the reason for it. So I wondered if in this
5 particular case, how that understanding occurred.

6 MR. BOPP: The understanding occurred because they
7 looked at the available information on when their
8 "obligation" for filing arose and they came to a very
9 reasonable conclusion that a lay person, someone without
10 legal training, and in particular, I believe, that which is
11 required, that is, being an expert in federal election law.

12 I mean, there are 20 people in the United States
13 that I would take their word for what obligation, any
14 particular obligation you have under federal election law
15 without any research.

16 CHAIRMAN WALTHER: It would be hard for us to
17 enforce a law if we were not to enforce it based upon just
18 people other than treasurers. They have an obligation to
19 understand this. And as I understand it, I don't know if
20 it's this particular treasurer, but there was -- your
21 organization did attend one of our courses.

22 MR. BOPP: Afterwards.

1 **CHAIRMAN WALTHER:** Was it afterwards?

2 **MR. BOPP:** Well then I don't understand why you
3 didn't say communication, when the communication is made.
4 Why would you use a term of art that you got to read Supreme
5 Court cases to figure out what it means? Why would you do
6 that? Why would you say, when you make a communication then
7 a report is due? That is -- starting in 2007, in one place
8 in the guide and all throughout the guide in the other
9 places, you say independent expenditure, which lay people
10 immediately use the word "disbursement" as a synonym to
11 expenditure, to the word "expenditure."

12 I mean, if you really want someone to understand
13 the obligation who is going to download a report -- a report
14 form from the website and read the instructions, why
15 wouldn't you say, when you do a communication that is
16 independent of a candidate, that's when your obligation to
17 report arises, and it's based on how much and when. But
18 instead, you use a term of art that has been litigated in
19 how many cases?

20 **CHAIRMAN WALTHER:** Commissioner Weintraub.

21 **MR. BOPP:** And whose meaning varies from circuit
22 to circuit and where the Commission has adopted different

1 policies on enforcement of the meaning of those words in
2 different circles? And you want lay people to do this?

3 CHAIRMAN WALTHER: Frankly, it says any political
4 committee who makes or contracts; what does that mean?

5 MR. BOPP: I think people know what a contract is.

6 CHAIRMAN WALTHER: That's an obligation that's
7 incurred, not one that's paid. I don't want to get into a -
8 - what you think the regs should say, but --

9 MR. BOPP: Well of course, as we know, we had a --
10 we had to go to the Supreme Court to find out that those
11 words meant not when you entered into the contract, but when
12 the communication was actually made, so that there wasn't an
13 advance reporting requirement when you entered into the
14 contract. And that was an interpretation made by the U.S.
15 Supreme Court in the McConnell case.

16 So even that during -- well, right before this
17 period of time -- well no, because the McConnell decision
18 was in December of 2003, so during one year of this election
19 cycle, there's an even a dispute over that question, whether
20 or not there was a reporting to be triggered under the law
21 because you entered into a contract.

22 CHAIRMAN WALTHER: Commissioner Weintraub.

1 **COMMISSIONER WEINTRAUB:** Thank you, Mr. Chairman.
2 I really came in here determined not to get into an argument
3 with you, Mr. Bopp. I just -- I'm just astonished. I'm
4 dumbfounded that you could suggest that one of the top
5 independent expenditure committees over the last almost 30
6 years is a member of the laity that could not be expected to
7 understand what an independent expenditure is.

8 They've been making these independent expenditures
9 for almost 30 years and you're going to seriously sit there
10 and argue that it was impossible for them to figure out that
11 says to you what an independent expenditure is, that that's
12 a term of art that they couldn't understand?

13 **MR. BOPP:** What I'm saying is is that you mislead
14 them and I don't know why you did that. You could have said
15 communication.

16 **COMMISSIONER WEINTRAUB:** If we had said
17 communication --

18 **MR. BOPP:** You mislead them and I don't know why.

19 **COMMISSIONER WEINTRAUB:** -- you would be in here
20 saying, why didn't you use the defined term in the
21 regulation? You made up this term that doesn't have a
22 definition to it.

1 MR. BOPP: By using the word "expenditure" and
2 analogizing it with disbursement in your publications, you
3 could -- you could -- it is reasonable to think that people
4 without legal training who do not know that the words
5 "independent expenditure" is a legal term of art would
6 misunderstand their reporting obligation when it's
7 triggered.

8 COMMISSIONER WEINTRAUB: So can anybody in the
9 country, other than those 20 people that you consider to be
10 experts, be held accountable for complying with the Federal
11 Election Campaign Act?

12 MR. BOPP: No, but I think that you and your --

13 COMMISSIONER WEINTRAUB: No?

14 MR. BOPP: No.

15 COMMISSIONER WEINTRAUB: Nobody in the country can
16 be held accountable for complying with this law?

17 MR. BOPP: I said no that's not my position.

18 COMMISSIONER WEINTRAUB: Oh, okay.

19 MR. BOPP: I think your question was, is that my
20 position? And my answer to that is no. But I think that
21 the confusion that has arisen here, the misunderstanding of
22 the reporting, is in part the fault of the Commission by its

1 communications, by your instructions.

2 COMMISSIONER WEINTRAUB: And is it just fortuitous
3 that so many other people manage to actually comply with the
4 law as it's written; we're just lucky on the other ones?

5 MR. BOPP: Maybe. Maybe others -- well few do
6 these, as you know, and in part because of the difficulty of
7 it. And what we have discussed here is just a tiny piece of
8 the difficulty of doing independent expenditures that arises
9 from the Federal Election Campaign Act. One which we just
10 barely touched on is the whole problem of estimating and
11 then providing the accurate information later, when you have
12 it, know it.

13 So there's a lot of problems with independent
14 expenditure burdens and this is just one. And I just think
15 that it's fair to look at your publications, that they're
16 not directed at lawyers, are they? Not directed at lawyers.
17 They're directed at the average person and they -- it's
18 quite reasonable to say that they at least confuse, if not
19 misrepresent the obligation that they have. This was a
20 reasonable thing that occurred.

21 CHAIRMAN WALTHER: Mr. Vice Chairman.

22 VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman.

1 If I could go back to, I think, it was the fourth point that
2 you raised, about how you feel like _____

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I don't want anybody to think that as somebody -- as someone's comments may -- might be interpreted, that the National Right to Life PAC had any desire not to comply with the law. This is the last place in the world they wanted to be, is sitting here in front of the Commission on any violation, or any potential violation.

So they do endeavor to comply with the law and I

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1 get plenty of questions. Unfortunately, I didn't get this
2 question. I get a lot of questions from them because they
3 really try and endeavor to comply with the law. But I think
4 you need to recognize that it's difficult. And I think that
5 the instructions that they received exacerbated that
6 difficulty. I think the fact that even though apparently
7 for other matters -- well I think that they were never --
8 they were never advised by anyone that had ever looked at
9 these, if anyone ever did, that there's a problem here with
10 the late reporting, which should have been readily apparent
11 for certainly anyone who works here.

12 That was a factor. I'm not saying any of these
13 say okay, walk, excused, go home. But these are all factors
14 that ought to be looked at.

15 CHAIRMAN WALTHER: Do you view the penalty issue a
16 little differently if in fact it did show that there were --
17 even using that theory, the payments were not -- the reports
18 were not filed on time?

19 MR. BOPP: Well I think you will see that they
20 were filed on time, as well as we have before, as already
21 indicated from the reporting of the reg.

22 CHAIRMAN WALTHER: Any questions? Commissioner

1 Hunter.

2 COMMISSIONER HUNTER: Does the National Right to
3 Life PAC have all the same employees that they've had, that
4 started there in 1980?

5 MR. BOPP: We have certainly one, which is the
6 comptroller of National Right to Life, who serves through --
7 serves, I think, as assistant treasurer. She is the same
8 person. But the -- but we have changed treasurers at
9 National Right to Life PAC.

10 COMMISSIONER HUNTER: So even though an
11 organization's --

12 MR. BOPP: Periodically, and I think one changed
13 somewhere in this period, time period, and I'm going to
14 provide you that information.

15 COMMISSIONER HUNTER: So even though the
16 organization's been around for a long time, it's been doing
17 this, people come and go. And the Republican National
18 Committee, where I worked for a time, has been around for a
19 long time, but we've had a lot of different people come in
20 and out of work there and obviously somebody came in with a
21 different interpretation of what's going on. I wanted to
22 ask you --

1 MR. BOPP: Apropos that. They have had a PAC
2 since 1980 and they have been doing independent expenditures
3 since 1980. Here we are 20 -- what is this, 29 years later.
4 I was the counsel then. I'm the counsel now. They are
5 still asking me questions. They are still asking questions.
6 It is amazing. So not only is that because they want to
7 comply, and they do very sincerely want to comply, but that
8 they -- but that there compliance questions that continually
9 arise because they're an active PAC.

10 One of my concerns generally that I've expressed
11 to the Commission is without reliable instructions and
12 explanations to the laity that they can rely upon,
13 understand and rely upon, that means that they have to hire
14 counsel. And what that's going to do is shut down a lot of
15 political speech just because of that factor alone.

16 So I do think it's an important issue and should
17 be a pressing concern of the Commission to make sure that
18 you provide information that can be accessible to and can be
19 relied upon by the laity to comply with your law.

20 CHAIRMAN WALTHER: Commissioner Hunter.

21 COMMISSIONER HUNTER: _____
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So thank you.

CHAIRMAN WALTHER: Commissioner McGahn.

COMMISSIONER MCGHAN: Thanks, Mr. Chairman.

Serious questions that I hadn't thought of, but the discussion about doing IEs, since your clients have been doing IEs since 1980, and a sophisticated player and all this other stuff, made me think about an argument you had made in your brief that this was the first cycle under the new law.

I apologize for sort of making some noise when you were talking, but I was trying to dig through all the regs and confirm that the law had changed. It's true, isn't it, that before BCRA, it wasn't even clear whether it was date of dissemination or date the money was paid as to what triggered the IE report, correct?

MR. BOPP: That is true. I mean I --

COMMISSIONER MCGHAN: BCRA clarified that, correct?

MR. BOPP: Correct.

COMMISSIONER MCGHAN: Before BCRA, the law was you didn't have to report IEs year-around on special reports,

1 only on your regular schedules, correct?

2 MR. BOPP: Correct.

3 COMMISSIONER MCGHAN: BCRA imposed this whole
4 regime year-around IE reporting and upped the thresholds for
5 the aggregate amount for such reports, correct?

6 MR. BOPP: Yes.

7 COMMISSIONER MCGHAN: Prior to BCRA it was -- it
8 was, I think within 20 days, these 24-hour reports, right?
9 It was a much less onerous regime, correct?

10 MR. BOPP: It was.

11 COMMISSIONER MCGHAN: Now that's an editorial
12 characterization, but you agree with my characterization, it
13 was a less onerous regime?

14 MR. BOPP: Yes.

15 COMMISSIONER MCGHAN: So the day before BCRA, your
16 client that had been doing it since 1980 a certain way, all
17 of a sudden had to change to an entirely new way, new
18 reporting obligations, new thresholds, new aggregates, new
19 timing, correct?

20 MR. BOPP: Correct.

21 COMMISSIONER MCGHAN: So any inference that your
22 client's been doing it a long time and therefore is a

1 sophisticated player, and therefore should be held to some
2 kind of higher standard, that doesn't seem to work here now
3 does it, given that the law changed?

4 MR. BOPP: I think you have to take into account
5 the law change as a factor in this situation and their
6 efforts to comply with that law.

7 COMMISSIONER MCGHAN: Prior to BCRA, do you know
8 how your client read the temporal requirement for the
9 report, meaning do you know if you filed based upon
10 dissemination or based upon expenditure?

11 MR. BOPP: You're testing my memory on this, but
12 my recollection is for a period of time I advised them that
13 it was on payment and then for a period of time I advised
14 them that it was on dissemination, because there was a
15 dispute over that. There was a question over that, and I
16 changed my view on what the stated law was at some point
17 during their existence.

18 I would be hard-pressed to reconstruct that better
19 than what I just said, but I know I provided them both
20 advice -- with my advice. Most of it was on the date of
21 dissemination and that's why I said what I said too in the
22 comment.

1 COMMISSIONER MCGHAN: But prior to this cycle and
2 the cycle in this case, it was a wholly different regime
3 than what confronted your client.

4 MR. BOPP: Different regime and I don't -- and I
5 don't represent that every lawyer agreed with me on either
6 of those advice, either parts of the advice that I gave,
7 that during a certain period of time you could report on
8 payment, then you had to report on dissemination. I don't
9 know whether others agree with me on that as well.

10 COMMISSIONER MCGHAN: I just wanted to confirm my
11 understanding of the law. This is not something where your
12 client had been doing it the same way since 1980 and all of
13 a sudden this sophisticated player -- it was significant sea
14 change in how they had to function.

15 MR. BOPP: And they had to now take into account
16 the contracts too. So I mean, there was multiple levels of
17 additional -- of additional things that had to be taken into
18 account.

19 COMMISSIONER MCGHAN: Let me explore that a little
20 bit and then I'll yield back, Mr. Chair. When the
21 aggregates change and it gets up to \$10,000 and your average
22 IE is 2,400, give or take a little over 2,000, and you're

1 not sure how to allocate the cost of the mail among
2 candidates until after you get the bill, maybe help me
3 explain how your client could in the future navigate this in
4 a way that would comply with the actual text of the reg and
5 still meet their ability to get their message out.

6 MR. BOPP: Well since the audit raised this
7 question, they have been attempting to comply. They believe
8 they've been complying with the current legal requirement
9 and so what they had been doing is when they do not have a
10 bill, then -- but the mail piece has gone out, they do
11 estimate. They provide a 24-hour, 48-hour report with an
12 estimate that is by candidate of the estimate of what the
13 mail piece costs.

14 Then what they do is when they get the bill, which
15 may be weeks, or even months later, they can then apply --
16 then they go back, and of course, doing a lot of independent
17 expenditures, this is a very extremely burdensome thing to
18 do, but they go back to that particular independent
19 expenditure, that mailing, if you will, and they now have
20 the cost figure and they apply the percentages and they file
21 an amended report.

22 Now I know that they have filed more than one

1 independent -- one amended report regarding some independent
2 expenditures, because the additional information comes to
3 them that influences how they believe either should be
4 allocated or what the costs were. For instance, they get
5 refunds. You -- when the mail vendor does the mailing, of
6 course they deposit what they believe to be the mail vendor,
7 or the committee, would deposit the amount that they believe
8 to be the approximate amount of the postage.

9 Once the post office calculates the postage, if
10 there's an overpayment, there's a refund. So if that refund
11 comes in after the bill from the mail vendor, then they
12 would have filed first an amended report that would reflect
13 the mail costs. And now with the additional information
14 regarding the poster -- postal fee, the refund, they then
15 file an additional amended report that reflects that change
16 in figures.

17 So it's -- but they have had to hire additional
18 staff in order to comply with the reporting regime.

19 CHAIRMAN WALTHER: We're going to have to move on
20 a little bit based upon the time we have, but I did want to
21 ask if General Counsel had any questions.

22 COMMISSIONER MCGAHN: Actually, Mr. Chair, if --

1 CHAIRMAN WALTHER: Excuse me, Commissioner McGahn?

2 COMMISSIONER MCGHAN: Thank you. I guess the same
3 would be true of T.V. and radio with make-goods -- same
4 idea. So my point is, I think -- I think this is a fair
5 point and you can agree or disagree. A lot of these IE
6 reports are estimates on their best day. They're not
7 metaphysically correct in any way, shape or form because of
8 the amount of transactions involved to get even a single
9 communication out the door.

10 You just don't go down to the post office, buy a
11 stamp, stick it on a mail piece and report 37 cents or 41
12 cents or whatever. I'm embarrassing myself. I don't want
13 the cost of a stamp is currently. So even today, your IE
14 reports, even if they're filed under oath, are at best
15 estimate?

16 MR. BOPP: Yes.

17 COMMISSIONER MCGHAN: Because to comply, that's
18 the best you can do.

19 MR. BOPP: That's correct. When you don't have
20 the final bill, that's the best you can do and they do that.

21 COMMISSIONER MCGHAN: Thank you, Mr. Chairman.

22 MS. DUNCAN: Just a few questions. Thank you, Mr.

1 Chairman.

2 I wanted to ask you a question about the third
3 point that you made, which was that the agency had other
4 methods to issue clear guidance and as a sub point, I think
5 you're stating, or at least implying, that you didn't
6 receive -- or the committee did not receive RFAIs or any
7 other notice of these later inappropriate notices. I think
8 you've also in response to Vice Chairman Petersen's question
9 indicated that had they received those kinds of notices that
10 might be a factor in determining an appropriate penalty.

11 Correct me if I'm wrong, but I don't believe you
12 argued either one of those things in your brief and so
13 therefore I don't have an extensive review of the RFAIs that
14 the agency would have sent. But I do understand and wanted
15 to ask you if you were aware that RFAIs on the amended April
16 quarterly report and the amended October quarterly report
17 addressing independent expenditure reportings were made or
18 were issued to the committee?

19 So the question is, are you aware of that and if
20 so, does that in any way affect your contention that the
21 committee did not receive any notice from the agency that
22 there were these post-election late independent expenditure

1 reports?

2 MR. BOPP: I don't remember the content of those,
3 but my recollection is that we were never -- no one ever
4 noticed that we were filing independent expenditure reports
5 after elections, as if we were doing it we were complying
6 with a law, as if we were doing communications after the
7 election urging people to vote in the election.

8 Now I think -- I agree with the proposition that
9 your quarterly disclosure reports would have a different --
10 would or quite could have a different day because that is
11 triggered by disbursement for sure. So I don't know what
12 they were saying.

13 MS. DUNCAN: Well as I said, since this wasn't
14 raised in your brief, I don't have a sheath of these reports
15 at my disposal, but I do know for a fact that there was one
16 on IE reporting that was sent to the committee on the
17 amended October quarterly report.

18 MR. BOPP: Well they -- they would have
19 immediately changed -- if anyone had raised the question,
20 are you filing these timely, that is the independent
21 expenditure report, then they would have immediately, I'm
22 sure, consulted with me and I would have told them that and

1 then they would have changed their practice immediately.

2 MS. DUNCAN: Let me move on to another question,
3 just to follow-up on some of the questioning about whether
4 the treasurer is accurately described as a member of the
5 laity or not and also to follow up on some of the questions
6 about this change in staffing or not during this period of
7 time.

8 I think we'll have to probably agree to disagree
9 about whether the treasurer is accurately described as
10 laity. But just as a factual matter, I wanted to try to
11 have you confirm whether the treasurer was there for the
12 2003-2004 cycle, which is the relevant cycle was in place at
13 that time for 13 years.

14 MR. BOPP: I don't recall and I said I would get
15 back with you all on that. I don't know that. I remember a
16 change in treasurer. I don't remember whether it happened
17 before or after this cycle.

18 MS. DUNCAN: Thank you.

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3 MS. DUNCAN: One last question just to follow-up
4 on the conversation about the pre-BCRA rules and I think I
5 was a little bit confused about your answer to that. Isn't
6 it the case that the time for reporting 24 hours from the
7 date of dissemination actually pre-dated BCRA? There were
8 other changes that were made and I think you've discussed
9 those. But isn't that something that stayed the same?

10 MR. BOPP: I've already said that my original
11 advice for them was reporting on payment and then I changed
12 that advice to reporting on dissemination and that was true
13 up to BCRA. That was my advice to my client.

14 Now we litigated three or four different issues
15 that surrounded these reports, as you recall, in the
16 McConnell case and there was substantial differences of
17 opinion as to various aspects of this reporting requirement,
18 and one of them was whether you had to report when you
19 entered into a contract that met the other requirement. So
20 I mean -- and that encompassed half of this election cycle,
21 that dispute, and it wasn't resolved until December of 2003.

22 So there were a lot of issues in flux that were in

1 the process of being worked out during this period of time
2 and I think our client made every effort to comply.

3 And by the way, let me just, in response to your
4 final question also, that if you're -- if your instructions,
5 if your candidate dies, if your report that you publish
6 periodically is not directed at the treasurer, who in the
7 world are you -- do you think you're advising on how to
8 comply with this law? I mean, it's their reporting
9 obligation.

10 If it's not directed at them, it would be directed
11 at other people that really don't care. I mean, the
12 treasurer's the one who cares. It's the treasurer who's the
13 one looks at these things, and unless you're going to
14 require -- direct it at a lawyer, I suppose it is to a
15 certain extent, and that's fine.

16 But your first thought, I would think, is how can
17 we make this law -- how can we help people to apply this law
18 so they don't have to hire lawyers? I think that would be
19 your very first thought, and that you would run these words,
20 that you would not use terms of art that are liable to
21 mislead people in what their obligations are, that you'd use
22 common words like "communication" when making communication.

1 I just don't -- that would seem so available, readily
2 available and would have given them the instructions they
3 needed to understand.

4 MS. DUNCAN: Just a final point on your final
5 point, which is that you have suggested that the term
6 "communication" would be easier to discern than the term
7 "expenditure." And I guess I would just draw your attention
8 to the BCRA campaign guide supplement that was published in
9 the record in January of 2003, where in fact that language
10 is used, date of communication.

11 MR. BOPP: Yeah, it's used one time. I agree.

12 MS. DUNCAN: But it is used, yes.

13 MR. BOPP: I agree. I agree. It's used one time.

14 MS. DUNCAN: Well then we can -- moment of
15 agreement.

16 MR. BOPP: Yes, we can.

17 MS. DUNCAN: Thank you. Thank you very much.

18 CHAIRMAN WALTHER: And as I understand, you can't
19 point to, at this point, any particular document the
20 treasurer was relying on on that occasion?

21 MR. BOPP: No.

22 CHAIRMAN WALTHER: Unless there are any other

1 questions, you can have five minutes to give a summation, if
2 you wish.

3 MR. BOPP: Yeah, thank you for the offer. I do
4 think I covered the points that I wanted to make. Thank you
5 for the offer, but I'll defer. So thank you.

6 CHAIRMAN WALTHER: Thank you very much.
7 Appreciate it. Excuse me.

8 COMMISSIONER WEINTRAUB: We've asked counsel for
9 additional submissions. Do we want to put a time frame on
10 that?

11 CHAIRMAN WALTHER: Counsel, what would work for
12 you?

13 MR. BOPP: The end of next week will be fine with
14 me, if that's all right with you.

15 CHAIRMAN WALTHER: Of course. Thanks very much.

16 MR. BOPP: Thank you.

17 CHAIRMAN WALTHER: The meeting is adjourned.

18 (Whereupon, at 11:29 a.m., the hearing was
19 adjourned.)
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CERTIFICATE OF NOTARY PUBLIC

I, JENNIFER M. O'CONNOR, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotype and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by and of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

JENNIFER M. O'CONNOR

Notary Public in and for the
District of Columbia

My Commission Expires:
February 14, 2010

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